Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

**PNEUMO ABEX CORPORATION,
PA HOLDINGS CORPORATION,
and THE HENLEY GROUP INC.**

Petitioners,

v.

WILLIAM F. GRUN,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district court had no power to enter a default judgment in response to a plaintiff's failure to prosecute or monitor the progress of his case for a period of three years, where that holding conflicts with the prior decisions of this Court and numerous courts of appeals, and where that holding severely limits the essential docket-control powers of the district courts.

2. Whether the court of appeals lacked jurisdiction—in an appeal from the denial of a Fed. R. Civ. P. 60(b) motion that was filed years after the entry of final judgment—to reach beyond that motion to review the merits of other rulings rendered before final judgment, in contravention of the prior decisions of this Court and numerous courts of appeals.

PARTIES TO THE PROCEEDINGS BELOW

The following were parties to proceedings in the court of appeals:

William F. Grun
Pneumo Abex Corporation
PA Holdings Corporation
The Henley Group Inc.

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Pneumo Abex Corporation, which formerly was known as PA Holdings Corporation, is a wholly-owned subsidiary of M&F Worldwide Corporation. The Henley Group Inc. has been succeeded by California Coastal Communities, Inc. The company originally known as Pneumo Abex Corporation was dissolved.

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IN THE

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**PNEUMO ABEX CORPORATION,
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Petitioners,

v.

WILLIAM F. GRUN,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

Pneumo Abex Corporation, PA Holdings Corporation, and The Henley Group Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals reversing the denial of plaintiff's Rule 60(b) motion, and further reversing the partial

denial of plaintiff's motion for summary judgment (Pet. App. 1a-28a), is reported at 163 F.3d 411. The opinion of the district court denying plaintiff's Rule 60(b) motion (Pet. App. 29a-40a) is reported at 170 F.R.D. 441. The earlier opinion of the district court denying plaintiff's motion for summary judgment (Pet. App. 41a-50a) is reported at 808 F. Supp. 632.

JURISDICTION

The court of appeals entered judgment on November 24, 1998. The court thereafter denied petitioners' timely petition for rehearing on January 5, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The decision of the court of appeals—which improperly *contracts* the inherent powers of the district courts to control their dockets by dismissing cases for want of prosecution, and simultaneously *expands* established limits on appellate jurisdiction—contradicts the prior decisions of this Court and numerous courts of appeals in two distinct and significant respects that warrant Supreme Court review.

First, the court of appeals imposed severe limitations on the authority of the district courts to control their dockets by dismissing cases that plaintiffs fail to prosecute or monitor for long periods of time. The uncontroverted record in this case reveals a void of over *three years* in which plaintiff—who was represented at all times by two law firms—failed to prosecute this litigation or to take reasonable steps to monitor its progress, such by as checking the court's publicly available computer docket sheet. The Seventh Circuit found plaintiff's "efforts" to be adequate, however, holding that "[t]he facts and

procedural history of this case do not reveal grounds for dismissal for failure to prosecute." Pet. App. 27a. That determination is contrary to prior decisions of this Court and other courts of appeals, which have confirmed the duty of litigants to prosecute their actions diligently and have upheld discretionary dismissals in the face of similar inactivity. *See, e.g.*, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651-52 (9th Cir. 1991); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42-43 (2d Cir. 1982); *Cherry v. Brown-Fraizer-Whitney*, 548 F.2d 965, 968 (D.C. Cir. 1976).

Supreme Court review of this aspect of the Seventh Circuit decision is especially warranted because it raises a question of exceptional importance to the administration of justice in the federal district courts. Promoting the just and efficient resolution of litigation long has been a central duty of district courts across the nation. In light of that duty, many district courts—including the district court involved in this case—have promulgated local rules providing for the dismissal of dormant cases for want of prosecution. *See* N.D. Ill. Gen. R. 21(A); *see also Link*, 370 U.S. at 631-32 n.7 (citing N.D. Ill. Gen. R. 21 and numerous similar local district court rules). The Seventh Circuit's determination that the district court did not have the discretion to dismiss after 36 months of inactivity by a plaintiff undermines the validity of those local rules and seriously erodes the power of our district courts to secure "the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1.

Second, even though this case reached the appellate court following the denial of a Fed. R. Civ. P. 60(b) motion that plaintiff filed three years after the entry of final judgment, the

court of appeals held that it had jurisdiction to decide the merits of prior rulings having nothing to do with plaintiff's Rule 60(b) motion. That jurisdictional holding conflicts with the prior decisions of this Court and numerous courts of appeals, which have ruled that when hearing an appeal from the denial of a Rule 60(b) motion, the court of appeals' jurisdiction is limited to addressing whether the denial of the motion was an abuse of discretion. *E.g.*, *Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *Hoult v. Hoult*, 57 F.3d 1, 3 (1st Cir. 1995); *Daily Mirror, Inc. v. New York News, Inc.*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976); *Windsor v. United States Dep't of Justice*, 740 F.2d 6, 7 (6th Cir. 1984); *Glass v. Seaboard Coast Line R.R. Co.*, 714 F.2d 1107, 1109 (11th Cir. 1983). By reviewing the merits of rulings that preceded the final judgment, even though plaintiff's ability to appeal from that judgment had long since expired when he filed his Rule 60(b) motion, the Seventh Circuit in this case dealt a serious and legally indefensible blow to the final judgment rule.

1. Proceedings Leading To The District Court's Rule 60(b) Ruling.

On April 4, 1990, plaintiff filed this lawsuit alleging claims for breach of a severance compensation agreement, intentional interference with contractual relations, and breach of an incentive compensation plan. After extensive discovery, the parties filed cross-motions for partial summary judgment. Pet. App. 6a. On November 19, 1992, the district court denied defendants' motion for summary judgment on Counts I and III, granted defendants' motion on Count II, and denied plaintiff's motion on Count I. Pet. App. 7a-8a.

After plaintiff unsuccessfully moved for reconsideration and for certification for interlocutory appeal, the parties proceeded to prepare for trial. On March 31, 1993, after the parties submitted their pretrial materials, the assigned Magistrate Judge entered an order approving the materials and returning the case to the district court. Pet. App. 8a. The next day, April 1, 1993, the district court entered a minute order setting the case for trial on September 14, 1993. *Id.*

It is undisputed that the parties did not receive notice of the order setting the case for trial. It also is undisputed, however, that the order was duly recorded on the court's computer docket sheet. It likewise is undisputed that between April 1, 1993 and September 14, 1993, plaintiff did not check that docket sheet or take any other steps to monitor his case.

On September 14, 1993, plaintiff failed to appear for trial. As a result, the district court issued an order of dismissal that was entered on the court's computer docket sheet. As the Seventh Circuit held in this case, the district court's order of dismissal was a final and appealable judgment: "[I]t was clear from the language chosen by the district court that the minute order constituted 'dismissal of the entire action end[ing] the litigation and forc[ing] the plaintiff to choose between appealing the judgment or moving to reopen the judgment . . . pursuant to Fed. R. Civ. P. 60.'" Pet. App. 19a n.8. According to plaintiff, he never received notice of the district court's dismissal, even though the docket reflects that notice was mailed, even though defendants received the mailed notice, and even though the text of the dismissal order was entered verbatim on the court's computer docket sheet.

Following the dismissal order, plaintiff did not take any affirmative action to move his case to trial for three more years. Counsel for plaintiff states that they did file a change of address form on May 5, 1994, sent a messenger sporadically to ask the clerks to check the court file (but not the computer docket sheet), once personally checked the file (but apparently did not see the order setting trial or dismissing the case, and did not check the computer docket sheet) in May 1994, and telephoned the clerk's office on May 19, 1994 to inquire about a trial date. Pet. App. 9a. Plaintiff's counsel also states that on two unspecified occasions in 1995, they allegedly had a clerk check the court file for a trial date. But that is the totality of plaintiff's efforts to prosecute this litigation from the September 14, 1993 dismissal order until August 1996, at which time plaintiff finally filed a motion to advance the case for trial. *Id.* At no time during the three-year period following the dismissal order did plaintiff or his counsel take the simple step of consulting the computer docket sheet, which would have disclosed both the missed trial date and the final dismissal order.

On August 23, 1996, at the hearing on plaintiff's motion to advance the case for trial, plaintiff's counsel asserted that plaintiff had just learned that the case had been dismissed in 1993. Pet. App. 30a. As a result of that dismissal, the district court denied plaintiff's motion and advised that if he wanted relief from the judgment, his only recourse would be a motion to reinstate under Rule 60(b). Pet. App. 10a. Plaintiff thereafter filed a motion to reinstate. *Id.*

2. The Rule 60(b) Ruling.

On December 17, 1996, after allowing full briefing and requesting additional information from plaintiff, the district court issued a memorandum opinion and order denying plaintiff's Rule 60(b) motion. Pet. App. 29a-40a. The court rejected plaintiff's argument "that the clerk, the judicial staff, and opposing counsel were derelict in prosecuting his case." Pet. App. 31a. The court observed that "[o]nce a party invokes the judicial system by filing a lawsuit, it must abide by the rules of the court; a party cannot decide for itself when it feels like pressing its action and when it feels like taking a break because '[t]rial judges have a responsibility to litigants to keep their court calendars as current as humanly possible.'" Pet. App. 35a.

The district court then rejected plaintiff's primary argument, made for the first time in his reply brief, that the 1993 judgment was "void" because it was entered without notice and therefore did not comport with due process. Pet. App. 36a. Citing controlling decisions, such as this Court's opinion in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962), the district court observed that a district judge need not always provide express notice before dismissing a case. Moreover, the court observed that plaintiff's complaint about lack of notice sounded hollow given that plaintiff "was effectively on constructive notice via the trial date order and dismissal order in the court's file and computer docket"—resources that plaintiff apparently either did not consult at all, or did not consult with sufficient care from the time the trial scheduling order was entered on April 1, 1993 until the mid-September 1993 trial date. Pet. App. 37a-39a. (The court of appeals did not hold clearly erroneous the district court's finding that the

trial date order was in the court file.) Having thus found plaintiff's Rule 60(b) motion to be lacking in merit, the district court ruled that "Grun's motion to reinstate is denied." Pet. App. 39a.

After denying plaintiff's Rule 60(b) motion, the district court proceeded to determine that the same result would be required on an alternative ground. According to the court, even if the 1993 dismissal order were void, plaintiff's lack of diligence following the entry of that order supplied an independent basis for refusing to allow plaintiff's claims to proceed. *Id.* After the dismissal order, plaintiff "waited three [more] years to bring any error to the court's attention by motion for status or trial, disregarding his responsibility to move his case forward. He demonstrated an intent to abandon his action." *Id.* As the district court observed, that inactivity was not without cost to defendants given that during the interim, Pneumo Abex had sold the division in which plaintiff had worked. Pet. App. 36a. The court explained (*id.* at 39a):

> Great prejudice to Pneumo Abex resulted. Pneumo Abex no longer has the ability to defend itself: its witnesses, evidence, and resources have dissipated. Consequently, in the alternative, the court dismisses the case for want of prosecution pursuant to Local General Rule 21(A).

3. The Seventh Circuit Decision.

The Seventh Circuit reversed, holding that plaintiff's inactivity did not support the result reached by the district court. Pet. App. 1a-28a. With respect to plaintiff's failure to consult the computer docket sheet or monitor his case during the 5½ months between the trial scheduling order and the trial

date, the panel held that plaintiff's inactivity did not support discretionary dismissal (Pet. App. 24a):

> Grun's failure to appear at a trial of which he had never had notice, due exclusively to courthouse errors, and his alleged failure to examine the court file during a five month period following his submission of pretrial materials, simply do not rise to a level that requires, or even allows, dismissal of his case.

The Seventh Circuit claimed that such a period of inactivity is common: "he was simply awaiting a trial date. It is certainly not that unusual for a litigant to hear nothing from the courthouse for a period of five months." *Id.* In reiterating the same point elsewhere, the panel cited with approval a Ninth Circuit decision that it described as holding that once a case is ready for trial, a "plaintiff is not obligated under the local rules to take further affirmative action." Pet. App. 26a (citing *Ace Novelty Co., Inc. v. Gooding Amusement Co., Inc.*, 664 F.2d 761, 763 (9th Cir. 1981)). Thus, the Seventh Circuit concluded that the 1993 dismissal order was void under Rule 60(b) as a violation of due process, and that the district court erred in concluding to the contrary. Pet. App. 25a.

In addition, the Seventh Circuit rejected the district court's alternative ruling that plaintiff's inactivity following the 1993 dismissal order independently supported dismissal for want of prosecution. Although the record showed that plaintiff and his counsel did not review the computer docket sheet, and did little else for a period of three years, the Seventh Circuit concluded that the "facts and procedural history of this case do not reveal grounds for dismissal for failure to prosecute." Pet. App. 27a.

Finally, even though plaintiff's appeal was from the denial of a Rule 60(b) motion, the Seventh Circuit ruled on the merits of the district court's 1992 partial denial of plaintiff's motion for summary judgment. Citing the district court's alternative dismissal for want of prosecution—but ignoring that the only reason the case was on appeal was because plaintiff had filed a Rule 60(b) motion that the district court had denied—the Seventh Circuit held that it had jurisdiction to consider the merits of the summary judgment ruling because it had jurisdiction from "final decisions" of district courts and the summary judgment ruling was subsumed into the "final judgment." Pet. App. 11a-12a. Thus pronouncing the jurisdictional issue "settled," the Seventh Circuit proceeded to reverse the district court and to remand solely for a calculation of damages. Pet. App. 12a-18a.

Defendants timely petitioned for rehearing. On January 5, 1999, the court of appeals denied the petition. Pet. App. 51a.

REASONS FOR GRANTING THE WRIT

By issuing a decision holding that plaintiff's years of inattention to this litigation permitted no adverse action by the district court—and by taking the further, extraordinary step of rewarding the inattentive plaintiff at bar by summarily sustaining his claims—the Seventh Circuit sent a message to federal court litigants that is antithetical to the just and efficient administration of justice. As demonstrated below, Supreme Court review is warranted for two independent reasons: (1) the Seventh Circuit's determination that the district court had no authority to default plaintiff in response to three years of inactivity conflicts with the prior decisions of this Court and

other courts of appeals, which have upheld the essential docket-control powers of the district courts; and (2) the Seventh Circuit's further determination on the merits of plaintiff's summary judgment motion likewise conflicts with the prior decisions of this Court and other courts of appeals, which have held that in reviewing denials of Rule 60(b) motions, appellate courts like the Seventh Circuit have no jurisdiction to reach the merits of summary judgment or any other rulings underlying the judgment.

I. The Seventh Circuit's Determination That Plaintiff's Years Of Inactivity Did Not Exhibit Any Want Of Diligence Conflicts With Decisions Of This Court, Decisions Of Other Courts Of Appeals, And The District Court's Rules.

Supreme Court review is warranted because the Seventh Circuit decision—which excuses a plaintiff's sustained neglect of the lawsuit he himself filed—has serious implications for the administration of justice. Although the Seventh Circuit decision highlights plaintiff's meager efforts to prosecute and monitor his case, the record is clear that: (1) during the 5½-month period between the trial scheduling order and the September 1993 trial date, plaintiff took no steps to review the publicly available computer docket sheet or otherwise to monitor the litigation; and (2) for a period of *three years* following the September 1993 dismissal order, plaintiff's counsel failed again to check the computer docket sheet, failed to file any motion, and failed to do anything else beyond making some perfunctory inquiries in May 1994 and directing a clerk to make further inquiries at two unspecified points during 1995. Those "efforts" fall far short of establishing due diligence. *See Tucker v. Commonwealth Land Title Ins. Co.*,

800 F.2d 1054, 1057 (11th Cir. 1986) ("Counsel made no written or oral inquiries to the court concerning the entry of the judgment for a period of ten months. The fact that he delegated the task of occasionally checking the docket sheet to an employee does not constitute the requisite diligence on the part of Tucker's counsel"; citation omitted).

The Seventh Circuit, however, found plaintiff's unexplained pre- and post-judgment spans of inattention to be perfectly acceptable. As for the pre-judgment period, the Seventh Circuit found that a 5½-month hiatus is not unusual and that a plaintiff has no obligation to do anything else once pretrial submissions are filed. *See* Pet. App. 23a-26a. As for the three-year period following the entry of judgment, the Seventh Circuit concluded simply that the "facts and procedural history of this case" did not suggest any lack of diligence on the part of plaintiff or the two law firms that represented him. Pet. App. 27a.

The Seventh Circuit opinion gives short shrift to the bedrock principle that litigants must exercise diligence when they use the courts to resolve their disputes, and further conflicts with the prior decisions of this Court and other courts of appeals, which have upheld the power of the district courts to dismiss cases when plaintiffs fail to pursue them diligently. As this Court observed in the leading case of *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962):

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in

the disposition of pending cases and to avoid congestion in the calendars of the District Courts.

As this Court further observed in *Link*, in recognition of that inherent docket-control authority, district courts across the nation have adopted local rules providing that dormant cases may be dismissed for want of prosecution. *See id.* at 631-32 n.7. One of the rules cited by this Court was N.D. Ill. Gen. R. 21—the same rule relied on by the district court in this case (Pet. App. 39a)—which presently provides that cases that have been inactive for six months may be dismissed for want of prosecution. Here, by holding that the district court was wrong in refusing to turn a blind eye to *three years* of inactivity by a plaintiff, the Seventh Circuit effectively abrogated that rule—which is consonant in every respect with Fed. R. Civ. P. 1's command to the district courts to secure the "just, speedy, and inexpensive determination of every action"—as well as the essential docket-control authority recognized by this Court in *Link*.

In addition to contradicting *Link*, the Seventh Circuit decision in this case conflicts with the decisions of other courts of appeals, which have recognized the power of district courts to dismiss actions as a sanction for long periods of inactivity or dormancy. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 651-52 (9th Cir. 1991) (affirming dismissal for want of prosecution in light of long periods of delay in prosecuting litigation); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42-43 (2d Cir. 1982) (affirming dismissal for want of prosecution where there had been long periods of inactivity); *Cherry v. Brown-Fraizer-Whitney*, 548 F.2d 965, 969-70 (D.C. Cir. 1976) (affirming dismissal for want of prosecution where case had been dormant for 17 months). The Seventh Circuit

decision—which concludes that a plaintiff has no further obligation to move a case forward once it purportedly is ready for trial, and that multiple-year periods of inactivity do not warrant dismissal for failure to prosecute—cannot be squared with those decisions.

The potential adverse effects of the Seventh Circuit decision on the administration of justice are profound. Due to the hard work of the district courts, and their aggressive intervention to prevent indolence and delay by litigants, cases are moving through the federal court system with ever-increasing dispatch. For example, the median circuit-wide time interval between the filing and disposition of cases in the district courts of the Seventh Circuit is six months, and for the small fraction of cases that survive for trial, the median circuit-wide time interval from filing through trial is 20 months. *See* Leonidas Ralph Mecham, *Judicial Business of the United States Courts: Annual Report of the Director* 159, Table C-5 (1997). In the face of those statistics, the view of the Seventh Circuit in this case that 5½-month hiatuses are common is clearly erroneous. Furthermore, the Seventh Circuit's approval of *several years* of virtual inactivity will deal a severe set-back to the district courts' ability to manage their dockets, deliver an unjustifiable vote of no-confidence in that regard, and send a clear and unfortunate message to litigants that indolence will be tolerated.

By settling on years of inattention as an acceptable norm for the conduct of litigation in the district courts, the Seventh Circuit decision seriously threatens to undermine all of the work leading to the foregoing statistics. If district courts are to carry out their mission of dispensing justice as quickly and efficiently as possible, they must possess the power to

promulgate *and enforce* rules requiring litigants to prosecute their cases diligently. By concluding that the district court in this case could not respond to plaintiff's lack of diligence by dismissing his case, the Seventh Circuit decision strikes a serious blow to the efficient administration of justice. Supreme Court review is necessary to prevent serious erosion to the essential docket control powers of the lower federal courts.

II. The Seventh Circuit's Exercise Of Appellate Jurisdiction Over The Merits Of The District Court's Summary Judgment Ruling Conflicts With A Decision Of This Court, Decisions Of Other Courts Of Appeals, And With The Final Judgment Rule.

By reviewing the merits of the district court's denial of plaintiff's motion for summary judgment, the Seventh Circuit decided an issue that it had no jurisdiction to consider. There is no question, as the Seventh Circuit itself found, that the district court entered final judgment in September 1993. Pet. App. 19a n.8. Three years later, when plaintiff finally decided to pursue his case again, the only available means for vacating the judgment was a motion under Rule 60(b). *See Britton v. Swift Transp. Co., Inc.*, 127 F.3d 616, 618 (7th Cir. 1997) (any motion seeking to modify judgment substantively that is filed more than 10 days after entry of judgment is evaluated under Rule 60(b)); *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992) (same).

Under established law, a plaintiff may appeal the denial of a Rule 60(b) motion, but that appeal is limited to the question whether the motion should have been granted. On such an appeal, the court of appeals does not review directly the prior judgment on the merits—let alone, as here, a prior interlocutory

ruling denying summary judgment. Otherwise, Rule 60(b) could be used to circumvent the time limits for filing appeals from final judgments. Here, by ruling on the merits of plaintiff's summary judgment motion, in connection with plaintiff's appeal from an adverse ruling on a Rule 60(b) motion, the Seventh Circuit enabled plaintiff to do exactly that—to avoid the time limits for appealing final judgments. Indeed, the Seventh Circuit enabled plaintiff to obtain more relief than any litigant who follows the rules could have obtained—review of the denial of a summary judgment motion.

In a footnote in *Browder v. Director, Dep't of Corrections*, this Court stated that on appeal from the denial of a Rule 60(b) motion, the appellate court "may review the ruling only for abuse of discretion . . . and an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *See* 434 U.S. 257, 263 n.7 (1978). Although this statement was dicta because the respondent before the Court had "disclaimed reliance on Rule 60(b)," *id.* at 263, several courts of appeals have since relied upon this clear enunciation as setting forth the principle that appellate review of a Rule 60(b) determination does not reach the merits of the underlying judgment. *See, e.g.*, *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir.), *cert. denied*, 119 S. Ct. 340 (1998); *Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir. 1985); *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992); *Lepkowski v. United States Dep't of Treasury*, 804 F.2d 1310, 1312 n.2 (D.C. Cir. 1986).

The decision of the Seventh Circuit conflicts with *Browder* and these cases. Instead, the Seventh Circuit determined that it was free to treat the appeal as if it were a timely appeal from a final judgment because, after expressly denying plaintiff's Rule 60(b) motion, the district court reached the same result on

an alternative ground—that even if the 1993 judgment were void, dismissal of plaintiff's case would still be justified three years later because of plaintiff's failure to prosecute the case during those years. The Seventh Circuit reasoned that because no binding authority *disproving* the existence of appellate jurisdiction in that posture had been found or presented, it could exercise jurisdiction (Pet. App. 11a-12a):

> We can find no binding authority, and apparently neither could [defendants], holding that we lack jurisdiction to review the district court's denial of summary judgment simply because the trial judge's subsequent entry of a final judgment resulted from the court's dismissal for want of prosecution. Having settled the jurisdictional question, we address the merits . . . .

In so ruling, the Seventh Circuit ignored the fact that the default ruling was an *alternative* holding on a Rule 60(b) motion—made *three years* after the actual entry of final judgment.

The Seventh Circuit also ignored its independent affirmative obligation to satisfy itself of the existence of appellate jurisdiction. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1013, 1013 (1998) ("[E]very federal appellate court has a special obligation 'to satisfy itself . . . of its own jurisdiction'"; *quoting Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)). The Seventh Circuit did not satisfy itself of its jurisdiction, and could not do so, because there simply is no authority for treating a district court's adverse Rule 60(b) ruling as a license for reaching the merits of rulings that should have been raised through a timely appeal following the entry of final judgment. *E.g., Browder*, 434 U.S.

at 263 n.7. Instead, if the court of appeals rules that Rule 60(b) relief should have been granted, its only option is to return the case to the district court for a resolution on the merits. The court cannot reach back, using an extreme form of pendent appellate jurisdiction, and address prior interlocutory rulings of the district court.

In light of those principles, a district court most certainly cannot enable a plaintiff to circumvent the rules governing appeals *wholly inadvertently*, by adding to a decision *denying* a Rule 60(b) motion an alternative ruling that leads to the same adverse result. Yet, the Seventh Circuit assumed that the district court did so, without citing any authority for that assumption.

The Seventh Circuit decision constitutes an improper expansion of appellate jurisdiction—one that is directly contrary to the numerous decisions just cited, which hold that denials of Rule 60(b) motions give rise only to limited appellate jurisdiction. Indeed, the decision below is particularly egregious because the Seventh Circuit took the extraordinary step of *reinstating* plaintiff's claims and *summarily reversing* the district court's denial of his motion for summary judgment, citing as its jurisdictional basis for reviewing that denial the district court's alternative 1996 dismissal for want of prosecution. The Seventh Circuit did so even the though it held the 1993 dismissal to be an appealable final judgment. Pet. App. 19a n.8.

Thus, plaintiff's failure to prosecute did not hurt his interests; in fact, that failure actually inured to his benefit. Absent the dismissal order prompted by plaintiff's lack of diligence, plaintiff would have faced a trial on the claims that

were the subject of the district court's summary judgment denial. Instead, the Seventh Circuit rewarded plaintiff's neglect by reinstating plaintiff's claims, sustaining them, and then reversing the district court's nonappealable ruling denying summary judgment.

Supreme Court review is warranted to protect the integrity of the final judgment rule and to conform the result in this case to prevailing jurisdictional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 18, 1999

APPENDICES

APPENDIX A

In The
United States Court of Appeals
for the Seventh Circuit

No. 97-1410

WILLIAM F. GRUN,

Plaintiff-Appellant,

v.

PNEUMO ABEX CORP.,
PA HOLDINGS CORP.,
and THE HENLEY GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 90 C 5273—**Charles R. Norgle, Sr.**, *Judge*

ARGUED SEPTEMBER 26, 1997—DECIDED NOVEMBER 24, 1998

Before CUMMINGS, COFFEY and EVANS, *Circuit Judges*.

COFFEY, *Circuit Judge*. William F. Grun ("Grun") brought suit against Pneumo Abex in April 1990, alleging Pneumo Abex breached both a Severance Compensation

Agreement ("SCA") and a separate "Management Incentive Compensation Plan" ("MICP"). Grun also brought suit against SA Holdings Corp. and The Henley Group, Inc., alleging intentional interference with contractual relations.[1/] After extensive discovery, the trial court denied Grun's motion for summary judgment on his claim that Pneumo Abex breached the SCA, denied Pneumo Abex's motion for summary judgment on Grun's claim that Pneumo Abex breached the MICP, and granted defendants' motion for summary judgment on Grun's intentional interference claim. Thereafter, the court scheduled the case for a September 14, 1993 trial on Grun's two breach of contract claims.

Neither party appeared on the trial date, and the court dismissed Grun's case because of his failure to appear. The court sent notices of dismissal, but Grun states that he did not receive the notice. Grun filed a motion to advance his case for trial three years later, still unaware of the dismissal order. The district court denied the motion and suggested that Grun file a motion for relief from the dismissal order under Federal Rule of Civil Procedure 60(b). Grun did so and the court denied the motion, holding that the dismissal was not void under Rule 60(b)(4). In the alternative, the court dismissed the case for want of prosecution. The court entered final judgment against Grun on December 17, 1996, and docketed it three days later, on December 20, 1996. On January 14, 1997, Grun filed a notice of appeal challenging (1) the district court's decision denying Grun's motion for summary judgment on his claim that Pneumo Abex breached the SCA, (2) the district judge's

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1/ PA Holdings and The Henley Group purchased Pneumo Abex in August of 1988.

denial of his Rule 60 motion for relief from judgment, and (3) the trial court's alternative dismissal for want of prosecution. We reverse and remand with instructions that the district court enter summary judgment for Grun on his claim for breach of the SCA and determine the amount of compensation to which Grun is entitled, and for a trial on Grun's claim for breach of the MICP.

I. BACKGROUND

A. *Pneumo Abex's Alleged Breach of the SCA.*

In October of 1987, Grun was President and General Manager of NWL Control Systems,[2/] a division of Pneumo Abex located in Kalamazoo, Michigan. At that time, Grun's personal business office was also located in Kalamazoo. On October 21, 1987, during the course of his employment, Grun entered into a SCA with Pneumo Abex ("the Company") due to the likelihood that the Company would be sold in the near future.[3/] The SCA contained two stated purposes: to "reinforce and encourage [Grun's] continued disinterested attention and undistracted dedication to his duties in the potentially disturbing circumstances of a possible change in control of the Company by providing some degree of personal financial security;" and to "induce [Grun] to remain in the employ of the Company." to achieve these purposes, the SCA provided that Grun would be entitled to a designated amount of severance compensation if two events occurred: (1) there was a "change in control" of the Company while Grun was still an employee

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2/ NWL Control Systems is a manufacturer of flight control systems.

3/ It is apparent from the record that Pneumo Abex drafted the SCA and simply asked Grun to sign and return it.

(SCA, §2(a)); and (2) Grun chose to terminate his own employment for any one of ten "good reasons," including "a relocation of the Company's principal executive offices or [Grun's] relocation to any place other than the location at which [he] performed [his] duties prior to a change in control of the Company." The SCA further provided that "[n]o provisions of this Agreement may be modified, waived or discharged unless such waiver, modification or discharge is agreed to in writing signed by [Grun] and the Company."

On March 25, 1988, approximately five months after Grun's SCA was signed by the parties, Norman J. Ryker, president and chief executive officer of Pneumo Abex, wrote a letter to Grun, apparently in an effort to explain the purpose of the SCA. Mr. Ryker stated that the SCA was to provide Grun with certain protections if a change in control occurred and Grun's position or compensation were substantially adversely affected. Mr. Ryker admitted that a change in the location of Grun's personal office was a potential adverse effect, but went on to explain that:

> [f]or holders of [SCAs] who do not work at the Company's [Boston] headquarters, a relocation of [the Company's] principal executive offices [in Boston] is not an adverse event. Inasmuch as you do not work at the Company's headquarters, this letter is to advise you that the Company did not intend for you to become entitled to termination compensation under Section 3(e)(vi) of the Agreement by virtue of the relocation of the Company's principal executive offices *unless* there is also a relocation of *your present* office. (Emphasis in original).

On April 5, 1988, Grun responded to Ryker's letter writing that:

> I cannot agree with [your] interpretation of the [SCA] which is contained in your letter of 3/25/88. My family and I consider a change in the location of the principal executive offices from the Boston area, which we consider to be our home, as one of the potential adverse effects of a change in control of the Company.

That same month, a prospective buyer signed a letter of intent to purchase Pneumo Abex, and the anticipated sale of Pneumo Abex was completed on August 29, 1988. Both parties agree this constituted a "change in control" under §2(a) of the SCA.

In April of 1989, the Company announced that various corporate functions, formerly handled at Pneumo Abex's corporate headquarters in Boston, would be divided among several other offices: the consolidation, tax, and treasury functions moved to New Hampshire; the legal and security functions moved to Newton, Massachusetts; the human resources and benefits functions were absorbed into various operating divisions; and a corporate office was established in Chicago. In addition, the Company closed its principal executive offices in Boston.

On August 31, 1989, Grun tendered his resignation seeking severance compensation under the terms of the SCA. He alleged (1) that the Company had undergone a "change in control;" and (2) that the move of the executive offices out of Boston constituted a "good reason," thereby allowing him to terminate his employment and entitling him to compensation. Specifically, Grun pointed to §3(e)(vi) of the SCA which listed, as one good reason, "a relocation of the Company's principal

executive offices or [Grun's] relocation to any place other than the location at which [he] performed [his] duties prior to a change in control of the Company." (SCA, §3(e)(vi)). The Company reviewed Grun's request. It decided Pneumo Abex had undergone a "change in control," but that Grun did not have "good reason" to resign because his Kalamazoo office had not been relocated. Accordingly, the Company denied Grun's claim to severance compensation. As a result, Grun decided to withdraw his resignation until the dispute surrounding the SCA was resolved. On October 15, 1989, however, Pneumo Abex terminated Grun's employment.

Grun filed the instant action on April 4, 1990, in the United States District Court for the Northern District of Illinois, Eastern Division. He alleged, among other things, that Pneumo Abex breached the SCA when it failed to pay him severance compensation as required by the SCA. Extensive discovery followed, and the parties filed cross motions for summary judgment. The district court referred the motions to magistrate judge Lefkow pursuant to 28 U.S.C. §636(b)(1).

On October 1, 1992, the magistrate judge submitted her Report and Recommendation to the trial court and recommended, in part, that Grun's motion for summary judgment be granted on his claim for breach of the SCA because all of the events necessary to trigger Grun's rights to severance compensation under the SCA had occurred. Specifically, the magistrate found that the SCA is an employee benefits plan governed by ERISA. Next, the magistrate noted that:

> the parties agree that a change in control, as contemplated by the SCA, occurred in August, 1989. Additionally, there

> is no dispute that Pneumo Abex's offices in Boston, Massachusetts were relocated in the fall of 1989. The parties' disagreement, then, is limited to whether ¶3(e)(vi) of the SCA was intended to trigger entitlement to severance (sic) compensation absent any relocation of the office where Grun worked.

The court held:

> it is apparent that the intention of the parties, *at the time the contract was made*, was to allow Grun to recover under the SCA if he terminated his employment within two years following a change in control and either Pneumo Abex's principal executive offices were relocated out of Boston, Massachusetts *or* his own place of work was relocated. The plain language of ¶3(e)(vi), when all of its words are taken in their ordinary sense, evidences this intention. (Emphasis in original).

As such, continued the magistrate judge, "all the events necessary to establish Grun's right to recover . . . have come to pass." The magistrate judge recommended that Grun be granted summary judgment on his claim for breach of the SCA.

In an order docketed on November 19, 1992, the district judge rejected the magistrate's recommendation pertaining to Grun's claim for breach of the SCA and denied Grun's motion for summary judgment. *See Grun v. Pneumo Abex Corp.*, 808 F. Supp. 632 (N.D. Ill. 1992). The trial court agreed with the magistrate that the "terms and meaning" of §3(e)(vi) are "actually straightforward and unequivocal," and that "[t]he plain meaning of this provision is that Grun would be entitled to the SCA benefits if Pneumo Abex's principal executive

offices were relocated." The court also opined that "the plain language of §3(e)(vi) is clear and unambiguous, and as such, the interpretation of this paragraph is a matter of law." Then, relying on our decision in *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982), the district judge noted that "even unambiguous language can be disregarded when the parties meant something other than that which was committed to paper." He concluded by holding that "[the fact] that Grun is entitled to SCA benefits because of Pneumo Abex's relocation from Boston is a *non sequitur*, indicative of a mutual mistake in the contract terms, which raises genuine issues of material facts (sic) concerning the SCA's execution." For this reason, the district court denied Grun's motion for summary judgment. Grun moved for reconsideration of the order or, alternatively, for certification of the order for an interlocutory appeal. The trial court denied both motions.

B. *The District Court's Dismissal for Want of Prosecution.*

Months later, following the close of discovery, the parties submitted their pretrial materials. On March 31, 1993, the magistrate judge entered an order approving the pretrial submissions, and returned the case to the trial court. On April 1, 1993, the trial court entered an order setting the trial for "September 14, 1992," rather than 1993. The order was signed by the district court judge and stated that each side was notified by telephone of the trial date. It is undisputed that neither side received notice of the trial date, either by telephone or otherwise, and consequently no one appeared for trial on September 14, 1993. The district court issued and entered a written order the next day, September 15, 1993, noting that the case had been called for trial, that no one had appeared, and that the court was dismissing the case due to Grun's failure to

appear.[4/] The record demonstrates that the dismissal order was never signed by the district court judge, and also notes that two dismissal notices were mailed to the parties. Counsel for the defendant received this dismissal notice but Grun's lawyers claim they did not receive the notice at any time.

Still under the impression that he was awaiting a trial date, Grun filed a change of address form in May of 1994 and sent copies to defendants' counsel, but apparently not to the court. Defendants' counsel received the change of address form, but elected not to contact Grun to advise him that his case had been dismissed. Grun's Chicago counsel,[5/] Ms. Dougherty, states in an affidavit that she has not received a single notice from the court since the March 1993 notice from the magistrate judge which explained that the case was being returned to the district court for the setting of a trial date. She states further that she had clerks from her office "periodically" check the court file, that on one occasion she personally checked the court file, and that neither she nor any of the clerks ever found an order setting the case for trial, much less dismissing the case. In addition, counsel states that she expressly recalls telephoning the district judge's law clerk in May of 1994, and was told that the case had not "come through yet" for trial but that she would be notified when the trial date was set.

In August of 1996, Grun's counsel filed a motion to advance the case for trial. At the hearing on the motion, she

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4/ The docket entry reads: "Case called for trial pursuant to court order dated 04/01/93. Counsel failed to appear. Case dismissed for plaintiff's failure to appear. terminating (sic) case. Mailed notice. (sb)[Entry date 09/15/93]."

5/ Grun had counsel in Los Angeles and Chicago.

was advised for the first time, by defendants' counsel, that the case had been dismissed in 1993. The district court denied the motion to advance (because there was no case to advance) and suggested that Grun file a motion to vacate the dismissal order pursuant to Federal Rule of Civil Procedure 60. Grun did so, relying on Rule 60(a) and Rule 60(b)(6). In his reply to Pneumo Abex's response, Grun also argued that the dismissal order was void under Rule 60(b)(4). After the motion was briefed, the trial court issued and entered a minute order requiring Grun's counsel to produce a copy of the court's call as listed in the *Chicago Daily Law Bulletin* for the day of trial, September 14, 1993. Grun's counsel filed a copy of the court's call; Grun's case did not appear in the *Bulletin*.[9/] On December 20, 1996, the district court denied Grun's motion to reinstate the case under all three provisions of Rule 60. *See Grun v. Pneumo Abex Corp.*, 170 F.R.D. 441, 444-47 (N.D. Ill. 1996). Alternatively, it declared the dismissal order void *ab initio* and, recognizing this meant the case was still "technically pending," dismissed the case for want of prosecution pursuant to Fed. R. Civ. P. 41(b) and Local Rule 21(A), because Grun had "waited three years to bring any error to the court's attention . . . and Pneumo Abex no longer has the ability to defend itself. . . ." *Id.* at 447. The court docketed a final judgment terminating Grun's case on December 20, 1997.

9/ After the Rule 60 motion hearing, Grun's counsel again reviewed the court file. She claims it contained numerous misfiled documents, and that certain papers pertaining to Grun's case bore incorrect case numbers.

II. ISSUES

Grun raises three issues for our consideration:

(1) Whether the district court correctly denied Grun's motion for summary judgment on his claim against Pneumo Abex for breach of the SCA;

(2) Whether the district court correctly denied Grun's motion for relief from judgment under Rule 60(b)(4);

(3) Whether the trial court abused its discretion when it dismissed Grun's case for want of prosecution.

III. DISCUSSION

A. *Whether the District Court Properly Denied Grun's Motion for Summary Judgment for Breach of the SCA.*

Initially, Pneumo Abex argues that we lack jurisdiction to review the district court's denial of summary judgment because, generally speaking, denials of summary judgment are interlocutory decisions and thus are not appealable. This court has jurisdiction to hear appeals from the "final decisions" of the federal district courts. 28 U.S.C. §1291. An order becomes final or appealable upon the entry of a final judgment. *See Herdrich v. Pegram*, 154 F.3d 362, 367 (7th Cir. 1998). The proper appeal of a final judgment renews all issues previously pleaded and resolved by the trial court in litigation. *See In re Grabill Corp.*, 983 F.2d 773, 775 (7th Cir. 1993). We can find no binding authority, and apparently neither could Pneumo Abex, holding that we lack jurisdiction to review the district court's denial of summary judgment simply because the trial judge's subsequent entry of a final judgment resulted from the court's dismissal for want of prosecution. Having settled the

jurisdictional question, we address the merits, beginning with defining the appropriate standard of review.

We review *de novo* the district court's denial of Grun's motion for summary judgment. *See Porter v. Whitehall Lab., Inc.*, 9 F.3d 607, 612 (7th Cir. 1993). That is, we review "without deference for the view of the district judge and hence almost as if the motion had been made to us directly." *Tobey v. Extel/JWP, Inc.*, 985 F.2d 330, 332 (7th Cir. 1993). Summary judgment should be granted if the movant demonstrates through its pleadings and other record materials filed with the court—pleadings, depositions, answers to interrogatories, admissions on file, and affidavits—that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the movant has met its burden, the nonmovant must set forth specific facts showing a genuine issue for trial, and may not rely upon mere allegations or denials of the pleadings. *See* Fed. R. Civ. P. 56(e); *Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1031 (7th Cir. 1998). In determining whether a genuine issue of material fact exists, we consider the evidence in the light most favorable to the nonmovant. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Grun and Pneumo Abex entered into and signed the SCA in October of 1987. Under the SCA's terms, Grun was entitled to severance compensation upon the occurrence of "a relocation of the Company's principal executive offices or [Grun's] relocation to any place other than the location at which [he] performed [his] duties prior to a change in control of the Company." SCA, §3(e)(vi). Grun argues that he is entitled to compensation under the section if the Company relocates either

his own personal office (in Kalamazoo) or the Company's Boston executive offices. Pneumo Abex, on the other hand, contends that Grun's right to payment is triggered only if the Company relocated Grun's own personal office. Thus, we have before us a case of contract interpretation. We are mindful that contract interpretation is a subject particularly suited to disposition by summary judgment. *See Metalex Corp. v. Uniden Corp. of America*, 863 F.2d 1331, 1333 (7th Cir. 1988).

Initially, the parties agree that the SCA is an employee welfare benefit plan governed by ERISA.[2/] *See* 29 U.S.C. §1001, *et seq*. ERISA requires that "[e]very employee benefit plan . . . be established and maintained pursuant to a written instrument." *Id*. at §1102(a)(1). Here, the written instrument is the SCA, and we construe it in accordance with the federal common law under ERISA and general rules of contract interpretation. *See Hammond v. Fidelity and Guaranty Life Ins. Co.*, 965 F.2d 428, 429 (7th Cir. 1992); *see also, e.g., Hickey v. A.E. Staley Mfg.*, 995 F.2d 1385, 1388-89 (7th Cir. 1993).

When interpreting written contracts, we initially determine, as a matter of law, whether the contract is ambiguous or unambiguous. *See Ryan v. Chromalloy American Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). Ambiguity exists if a provision is subject to reasonable alternative interpretations. *See Hickey*, 995 F.2d at 1389 (citing *Taylor v. Continental Group*, 933 F.2d

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2/ We note that an appellate court reviewing denial of benefits under ERISA reviews under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Pneumo Abex does not contend that it had such authority, and does not suggest our review should be anything but *de novo*.

1227, 1232 (3rd Cir. 1991)). We agree with both the magistrate judge and the district court which held the subject provision to be unambiguous, straightforward and unequivocal. Courts must interpret the express terms of a plan "in an ordinary and popular sense as would a person of average intelligence and experience. . . ." *Pitcher v. Principal Mut. Life Ins. Co.*, 93 F.3d 407, 411 (7th Cir. 1996) (citing *Meridith v. Allsteel, Inc.*, 11 F.3d 1354, 1358 (7th Cir. 1993)). We can imagine no ordinary or reasonable interpretation of the relevant provision other than the one Grun suggests; neither could the magistrate judge or the district judge. The language Pneumo Abex chose to use when it drafted the SCA plainly and unambiguously entitles Grun to resign and receive compensation if either his personal office was moved from Kalamazoo *or the Company's executive offices were moved from Boston*.

Despite its findings that §3(e)(vi) is unambiguous, and that there is "no dispute that Pneumo Abex's executive offices in Boston closed in . . . 1989," the district court denied Grun's motion for summary judgment. The court relied on *White v. Roughton*, 689 F.2d 118 (7th Cir. 1982), for the proposition that "a court can properly disregard even unambiguous language when it is convinced that the parties meant something different from what they said." *Id.* at 120. The trial judge then declared that §3(e)(vi) was a "*non sequitur*, indicative of a mutual mistake in the contract terms, which raises material issues of genuine facts (sic) concerning the SCA's execution." Finally, the judge noted that "to decipher the actual expectations of the parties, the court must look to the negotiation, bargaining, and past conduct of the parties[,]" and

on these grounds, found that summary judgment was inappropriate.

We disagree. Initially, we note that as a general rule, an unambiguous contract should be construed without reference to extrinsic evidence:

> [i]f a district court determines that the pertinent provisions of the contract are unambiguous, it need not consider extrinsic evidence. –At that point, the district court should proceed to declare the meaning of those provisions.

Ryan v. Chromalloy American Corp., 877 F.2d 598, 602 (7th Cir. 1989); *see also Bellino v. Schlumberger Tech., Inc.*, 944 F.2d 26, 32 (1st Cir. 1991) ("Basic contract . . . principles preclude federal courts from considering extrinsic evidence where the ERISA terms in question are unambiguous."); *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988) ("If the contract is unambiguous, the court is to construe it as a matter of law."). Thus, if the language of the contract provides an answer, then the inquiry is over; parol evidence is neither necessary nor admissible. *See Wikoff v. Vanderveld*, 897 F.2d 232, 238 (7th Cir. 1990). The rule against admitting unnecessary extrinsic evidence supports the law's "general policy of upholding the integrity of written contracts and favoring written terms over extrinsic evidence. . . ." *See Air Line Stewards and Stewardesses Assoc., Local 550, TWU, AFL-CIO v. Trans World Airlines, et al.*, 713 F.2d 319, 322 n.2 (7th Cir. 1983) (citation omitted). Thus, when a contract is unambiguous, "[w]e refuse to indulge in judicial activism" by "constru[ing] the [contract] beyond its clear and obvious language. . . ." *See Heller v. Equitable Life Assurance Soc'y*, 833 F.2d 1253, 1257 (7th Cir. 1987).

Despite this accepted rule, this Circuit has held that when the district court finds that a "mutual mistake" has occurred in the formation of the contract, it can "disregard" unambiguous words. *See White*, 689 F.2d at 120. But this is not done lightly; where language is unambiguous, we ignore it only in "the rare case where literal application of a text would lead to absurd results or thwart the obvious intentions of its drafters." *Marlowe v. Bottarelli*, 938 F.2d 807, 812 (7th Cir. 1991) (citations omitted). We disagree with the trial judge's reliance on *White* to find that a mutual mistake existed which led to the formation of the SCA, and in particular, the inclusion of the Boston executive offices provision.

A mutual mistake results when "*both parties* share a common assumption about a vital existing fact upon which they based their bargain and that assumption is false . . . [and] because of the mistake, a quite different exchange of values occurs from the exchange of values the parties contemplated. . . ." *McLaughlin v. Jung*, 859 F.2d 1310, 1313 (7th Cir. 1988) (emphasis added) (citing J. Calamari & J. Perillo, *contracts* §9-26 (3d Ed. 1987)); *see also*, *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 479-80 (5th Cir. 1994) (in interpreting an ERISA-governed insurance policy, court noted that where both parties are mistaken as to material aspect of contract, court can reform contract). However, "a self-serving statement . . . that a party did not understand the contract to mean what it says (or appears to say) will not suffice." *AM Int'l, Inc. v. Graphic Mgmt. Assoc., Inc.*, 44 F.3d 572, 575 (7th Cir. 1995) (quoting *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 622 (7th Cir. 1989)).

In this case, Pneumo Abex argues that it did not mean what it wrote. Grun, on the other hand, has consistently maintained

there was no mutual mistake, and that he received exactly the "exchange of values" he contemplated when he signed the SCA. The record demonstrates that Grun believes, and the record reveals he has always believed, that closure of the Boston office prompted his rights to compensation under the SCA. As such, Pneumo Abex has failed to establish that *both* parties agreed to a mistaken material term in the SCA; the mistake is not mutual.

Grun initially joined the Company at its Boston location, and though he had worked for the Company at other locations, he had previously returned to work at the Boston office on one prior occasion. Indeed, the correspondence exchanged between Ryker and Grun, written long before the outset of this litigation, demonstrates that Grun meant exactly what was written in the SCA. Specifically, Ryker's March 25, 1998 letter to Grun explained, in part, Pneumo Abex's interpretation of the SCA. In response, ten days later Grun wrote that "[m]y family and I consider a change in the location of the principal executive offices from the Boston area, which we consider to be our home, as one of the potential adverse effects of a change in control of the Company." Moreover, Grun submitted deposition testimony, not disputed by Pneumo Abex, that he contacted the general counsel of Pneumo Abex, Christoph Hoffman, before he signed the SCA to confirm that the Boston office clause applied to him. According to Grun, Hoffman stated "I thought you would have had an interest in coming back to Boston. It's there in your agreement. It's a good agreement." Grun's intentions, even before this litigation ensued, were precisely in line with what the Boston clause provided. In these circumstances, there was no "*mutual* mistake."

In addition, the SCA contained a "no oral modifications" clause which explicitly stated that "[n]o provision of this Agreement may be modified, waived or discharged unless such waiver, modification or discharge is agreed to in writing by [Grun] and the Company." Mr. Ryker's letter may have attempted to modify the terms of the SCA, but Grun explicitly rejected Ryker's interpretation, and certainly did not sign off on any changes.

The record contains ample evidence reaffirming the unequivocal express terms of the SCA. Though Pneumo Abex may not have intended to draft the SCA as it did, the unambiguous terms of the SCA do not conflict with the intentions of Pneumo Abex *and* Grun, and the *White* "mutual mistake" rationale for ignoring plain meaning is absent. Pneumo Abex persuaded the trial court to *simply ignore* the plain language of the SCA, *language which it drafted*, and conclude that the propriety of its denial of severance compensation to Grun is a jury question. In assenting to Grun's plea to ignore the unambiguous terms, the district court engaged in the very judicial activism that we warned against in *Heller*, 833 F.2d at 1255. The courts are not "free to cast aside the agreed upon terms" of a contract, *see Bechtold v. Physicians Health Plan of N. Ind., Inc.*, 19 F.3d 322, 328 (7th Cir. 1994), and we cannot permit Pneumo Abex to unilaterally extinguish Grun's entitlement to compensation. As such, we reverse the district court's denial of Grun's motion for summary judgment on his claim for breach of the SCA. We direct the court to enter summary judgment for Grun on that claim, and to determine the appropriate amount of compensation to which Grun is entitled under the SCA.

B. *Whether the District Court Abused Its Discretion When it Denied Grun's Rule 60 Motion for Relief from Judgment?*[8/]

Before addressing the merits of Grun's Rule 60 motion, it is necessary to briefly recap the relevant procedural history of this case. In April of 1993, the district court set this case for trial to begin in September of 1993. It is undisputed that neither party received notice of the trial date. When neither party appeared for trial, the district court dismissed Grun's case, and in a September 15, 1993 minute order, stated: "Case called for trial pursuant to court order . . . . Counsel failed to appear. Case dismissed for plaintiff's failure to appear." The next day, the court sent notices of the dismissal to the parties, and though defense counsel acknowledges that he received such notice, plaintiff's counsel alleges in an affidavit filed with the district court that she did not receive the notice. Eight months later, Grun sent a change of address form to defense counsel, who chose not to inform Grun that the case had been

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8/ A Rule 60 motion may be brought only following the entry of a final judgment. *See* Fed. R. Civ. P. 60. A final judgment must "set forth the relief to which the prevailing party is entitled or the fact that the plaintiff has been denied all relief." *Reytblatt v. Denton*, 812 F.2d 1042, 1044 (7th Cir. 1987). Rule 58 requires the entry of a separate document, which informs "the parties (and the appellate court) exactly what has been decided and when." *Id.* at 1043. The district court did not enter a separate judgment on Form AO 450 following the dismissal of the case. It did, however, enter the above-referenced minute order. A minute order can satisfy the separate document requirement of Rule 58 in some instances. *See Paganis v. Blonstein*, 3 F.3d 1067, 1070 n.1 (7th Cir. 1993) (citation omitted). Here, it was clear from the language chosen by the district court that the minute order constituted "dismissal of the entire action end[ing] the litigation and forc[ing] the plaintiff to choose between appealing the judgment or moving to reopen the judgment . . . pursuant to Fed. R. Civ. P. 60." *Benjamin v. United States*, 833 F.2d 669, 671 (7th Cir. 1987) (citations omitted).

dismissed.[2/] Moreover, Grun's counsel alleges that she sent employees of her firm to review the court file to check for a trial date, and that in May, 1994, counsel spoke directly to the court clerk and inquired about the trial date. The court clerk informed counsel that a trial date had not yet been set, but that counsel would be notified as soon as a date was set.

On August 15, 1996, Grun, still under the impression that he was awaiting a trial date, moved the court to advance the case for trial. The court denied the motion, (because technically there was no case to advance), and suggested Grun move for Rule 60 relief from the September 14, 1993 dismissal order. Grun did so, and on December 20, 1996, the court denied Grun's Rule 60 motion.

In its Order and Opinion denying Grun Rule 60 relief, the trial court first found that its September 14, 1993 dismissal order, entered one day after the parties failed to appear for trial, was proper. The court continued:

2/ We do not condone Pneumo Abex's counsel's decision to remain silent when he admittedly knew that Grun was unaware of the dismissal order, *and* that neither party had received notice of the trial date. Counsel admits he researched whether he had an obligation to inform Grun of the dismissal notice and, finding no explicit obligation in the rules, he chose to remain silent. We note that the Rules of Professional Conduct for the Northern District of Illinois prohibit attorneys from engaging in conduct that is prejudicial to the administration of justice. *See* Rule 8.4. And, the Standards for Professional Conduct Within the Seventh Federal Judicial Circuit prohibit an attorney from causing a case to be dismissed without first notifying counsel. *See* Duty 18. Pneumo Abex's counsel did not affirmatively "cause" the case to be dismissed, but counsel was well aware that things were amiss and chose not to fix them even though doing so would have promoted the interest of fair play. Regardless of whether an explicit rule required Pneumo Abex's counsel to alert Grun's attorney of the dismissal, the spirit of the rules required such a result.

> [a]lternatively, the court finds that the dismissal order was void *ab initio* . . . Grun has long had constructive notice of the long-passed trial date and the court's clerical error . . . [and Grun] demonstrated an intent to abandon his case. . . . Consequently, in the alternative, the court dismisses the case for want of prosecution pursuant to Local Rule 21(A).

Thus, we must examine whether Grun was entitled to Rule 60 relief from the trial court's dismissal order; second, if we find Grun is entitled to Rule 60 relief, we must examine the district court's alternative finding dismissing Grun's case for want of prosecution.

Initially, we examine Grun's Rule 60(b) claim.[10/] Grun requests relief under Rule 60(b)(4), which authorizes relief when "the judgment is void." Fed. R. Civ. P. 60(b)(4). We review denial of a Rule 60(b)(4) motion *de novo*. A judgment may be deemed void if the court that rendered the judgment acted in a manner inconsistent with due process of law. *See United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply*, 55 F.3d 1311, 1316 (7th Cir. 1995) (citations omitted). Generally, due process requires that all

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10/ Fed. R. Civ. P. 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence would not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

litigants be given notice and an opportunity to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). "An elementary and fundamental requirement of due process in any proceeding which is to be afforded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 13 (quoting *Mullane*, 339 U.S. at 314). Grun argues that the September 14, 1993 order dismissing his case for failure to appear at trial violated due process because he did not receive notice of the trial date.

Indeed, it is clear from the record that the district court inadvertently failed to notify either of the parties, either by telephone, mail or otherwise, that they had a trial date. Not surprisingly, it is also undisputed that neither party appeared for trial. It is also clear that Grun's failure to appear at the trial formed the *sole basis* for the district court's September 14, 1993 dismissal of Grun's case. In its Order and Opinion denying Rule 60 relief, the district judge held that its dismissal order was not void because:

> [t]he court's order setting the trial date was in the court's file and computer docket between April 7, 1993, and September 14, 1993—the date of dismissal. Thus, Grun should have known of the impending trial date. Apparently, neither Grun nor his counsel bothered to examine the file during that five-month period.

To justify its decision, the court relied on "a critical line of cases" beginning with *Link v Wabash R.R. Co.*, 370 U.S. 626 (1962). But *Link* and the cases the district court considers its progeny are totally distinguishable. In *Link*, for instance, the district judge dismissed plaintiff's case *sua sponte* for failure to appear at a pretrial conference, and did so without giving notice that the case would be dismissed. *See id.* at 629. The court stated that "the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing does not necessarily render such a dismissal void." *Id.* at 632. But the facts demanding dismissal in *Link* are discernibly different from those in *Grun*. In *Link*, the trial court had explicitly notified Mr. Link's counsel of the pretrial conference and counsel simply failed to attend. This mistake followed other instances where Link had been less than vigorous in prosecuting his case. The Supreme Court reasoned that district courts, "acting on their own initiative, [are permitted] to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. *Id.* at 630.

Thus, the Supreme Court's holding in *Link* does not stand for the proposition that a district court maintains discretion to dismiss a case when a party fails to show up for a trial, conference or hearing *even though the trial court failed to give notice of the hearing*. Rather, *Link* holds that *once a court has grounds for dismissal*, the court's failure to grant a hearing to discuss the dismissal is not *per se* void for lack of due process. The district court also cited to *Dickerson v. Board of Educ. of Ford Heights, Ill.*, 32 F.3d 1114 (7th Cir. 1994) in support of its decision to dismiss the case. But *Dickerson* involved dismissal of a case because of a party's repeated failure to

comply with court orders. Thus, *Dickerson* is similarly not on point.

The trial court's reliance on *Link* and its progeny, to justify both the dismissal and subsequent refusal to grant Rule 60 relief from judgment, is incorrect and unpersuasive. Grun's failure to appear at a trial of which he never had notice, due exclusively to courthouse errors, and his alleged failure to examine the court file during a five month period following his submission of pretrial materials, simply do not rise to a level that requires, or even allows, dismissal of his case.

Also compelling is that the record is barren of any suggestion whatsoever that Grun was dilatory prior to the September 14, 1993 dismissal. On the contrary, Grun had been vigorously prosecuting his case. The record demonstrates that Grun's counsel had appeared at all prior hearings,[11/] had timely propounded and answered written discovery, had filed a summary judgment motion which the magistrate judge had recommended be granted (in fact, the magistrate had recommended a sizeable award to Grun), and had completed the submission of required pretrial materials and was prepared for trial. From Grun's perspective, he was simply awaiting a trial date. It is certainly not that unusual for a litigant to hear nothing from the courthouse for a period of five months. Obviously, defense counsel felt the same; he did not check the court docket or contact the court clerk to get a trial date either, as evidenced by the fact that he did not show up for trial.

11/ The docket reveals at least four status conferences, and there is no indication that plaintiff failed to appear for any one of these, though apparently counsel for defendant was absent on one occasion.

Grun's actions are not representative of the actions of a litigant deserving the harsh sanction of dismissal. The dismissal order is void under Rule 60(b)(4) because it denied Grun due process, and the district court should have granted Grun's Rule 60 motion for relief from judgment.

C. *Whether the District Court Abused its Discretion by Alternatively Dismissing Grun's Case for Failure to Prosecute.*

Because we find Grun's Rule 60 motion should have been granted, we next turn to the court's alternative holding dismissing the case for want of prosecution. We review the trial court's dismissal for want of prosecution under an abuse of discretion standard. *See Dunphy v. McKee*, 134 F.3d 1297, 1300 (7th Cir. 1998) (citations omitted).

In its December 20, 1996 order, the trial court states:

> [t]he order setting the case for trial . . . has been in the court's file and computer since April 3, 1993. Grun has long had constructive notice of the long-passed trial date and the court's clerical error. However, Grun waited three years to bring any error to the court's attention for status or trial, disregarding his responsibility to move the case forward. He demonstrated an intent to abandon his action. Consequently, in the alternative, the court dismisses the case for want of prosecution pursuant to Local General Rule 21(A).

Undoubtedly, district courts possess the inherent authority to dismiss cases *sua sponte* for a failure to prosecute. *See GCIU Employer Retirement Fund v. Chicago Tribune Co.*, 8 F.3d 1195, 1199 (7th Cir. 1993) (citation omitted). However,

dismissal for failure to prosecute is "a harsh sanction which should usually be employed only in extreme situations, when there is a *clear record of delay* or contumacious conduct, or when other less drastic sanctions have proven unavailable." *Pyramid Energy Ltd. v. Heyl & Patterson, Inc.*, 869 F.2d 1058, 1061 (7th Cir. 1989) (emphasis in original) (citations omitted). Moreover, we have held that "there *must be an explicit warning* before the case is dismissed [for failure to prosecute]." *Ball v. City of Chicago*, 2 F.3d 752, 760 (7th Cir 1993) (emphasis added). And, "dismissals without warning are appropriate in only the most extreme cases, where it is clear that counsel must have *expected* his actions (or inaction) to be answered with dismissal." *In re Bluestein & Co.*, 68 F.3d 1022, 1026 (7th Cir. 1995) (emphasis in original).

Grun references and distinguishes several cases in which a plaintiff's suit was dismissed for failure to prosecute because of a pattern of dilatory or contumacious behavior. Grun argues that, unlike those plaintiffs, he has not engaged in such dilatory or contumacious tactics and thus, dismissal for failure to prosecute is unwarranted. Grun asserts that he and his counsel did not prosecute his case because he was awaiting a trial date, and not having received notice thereof, he assumed that the court had not yet scheduled the case for trial. *See Ace Novelty Co. v. Gooding Amusement Co.*, 664 F.2d 761, 763 (9th Cir. 1981) (when case is ready for trial, plaintiff is not obligated under the local rules to take further affirmative action).

While it is true that counsel is expected to monitor the disposition of his client's case, *see DeRango v. United States*, 864 F.2d 520, 523 (7th Cir. 1988), the record reflects Grun's attorney's efforts in this regard. Grun filed a change of address form and sent copies to defense counsel on May 5, 1994. In

addition, one of Grun's Chicago attorneys caused employees from her office to periodically check the district court file for trial dates. More importantly, counsel personally reviewed the file and could not locate any order setting the case for trial or dismissing the case. Grun's counsel explicitly recalls telephoning the district court's clerk on or about May 19, 1994 to inquire about a trial date. The clerk informed her that the case had not "come through yet" for trial, and that counsel would be notified when the trial was set.

Each case that is dismissed for lack of prosecution must be reviewed in light of its particular facts and procedural history. *See GCIU Employer Retirement Fund*, 8 F.3d at 1199. The facts and procedural history of this case do not reveal grounds for dismissal for failure to prosecute. These facts fail to evidence a "clear record of delay or contumacious conduct." *See Pyramid Energy*, 869 F.2d at 1061. Moreover, the trial court dismissed the case prior to issuing "an explicit warning," *see Ball*, 2 F.3d at 760, and Grun could not have expected his inaction to be answered with dismissal. *See In re Bluestein*, 68 F.3d at 1026.

IV. CONCLUSION

We reverse and remand and direct the district court to enter summary judgment in favor of Grun on his claim for breach of the SCA, and to determine the amount of compensation Grun is entitled to under the SCA. We also reverse the district court's denial of Grun's Rule 60 motion, and alternative dismissal of Grun's case for want of prosecution. As such, we remand this case to the district judge for trial on Grun's

remaining claim against Pneumo Abex for breach of the Management Incentive Compensation Plan.[12/]

The judgment of the district court is

REVERSED AND REMANDED.

12/ We deny Grun's request that the case be assigned to a different trial judge pursuant to 7th Circuit Rule 36. We are confident application of the rule is not necessary to "avoid the operation of bias or mindset." *See Cange v. Stotler & Co.*, 913 F.2d 1204, 1208 (7th Cir. 1990).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. GRUN,	)	
	)	
Plaintiff,	)	
	)	No. 90 C 5273
v.	)	
	)	HONORABLE
PNEUMO ABEX	)	CHARLES R. NORGLE
CORPORATION, et al.,	)	
	)	
Defendants.	)	

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Over three years ago, the court dismissed this case. It did so because neither Plaintiff William F. Grun ("Grun") nor his counsel showed up for trial. After three years of silence, Grun now moves this court to reinstate his case and to set it for trial. For the following reasons, his motion is denied.

Grun brings his motion to reinstate pursuant to Federal Rules of Civil Procedure 60(a) and (b). In support of his motion, Grun tells the court that, in 1990, he filed his action in the United States District Court for the Central District of California. The California court transferred the case to this court. During the pendency of this case, both local and California counsel have represented Grun.

Then, interestingly, Grun states, "The case has been pending before this Court from the time of its transfer to the present date." Grun is wrong: the court terminated the case for want of prosecution over three years ago, after the parties failed to appear for trial[1/]. The order setting the case for trial appeared on the court's computer docket as of April 7, 1993. The termination order appeared on the court's computer docket as of September 15, 1993.

Grun goes on to state that the parties filed the final pretrial order. However, he pleads, neither he nor his counsel ever received notification of a trial date, despite inquiries to the court's clerk.

> [F]inally, on August 23, 1996, Plaintiff moved to advance the case for trial. At the hearing, counsel for Defendant surprised counsel for Plaintiff by stating that an order of dismissal had been entered in this proceeding on September 14, 1993 . . . . Plaintiff's counsel, stunned by the bombshell dropped by Defendant's counsel . . . subsequently reviewed the court file," (Mot. to Reinstate at 2.)

because, apparently, counsel had failed to do so for three years.

According to Grun, the court's order setting the 1993 trial date indicated that notice to the parties of the trial date was given by telephone, but that, actually, Grun never received such notification. Arguably, after three years, the court's memory has faded regarding the details surrounding its notification of

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1/ Local General Rule 21(B) provides: "Failure To Appear At Court Call — An order of dismissal for want of prosecution or an order of default may be entered if counsel fails to respond to a call of the case set by order of court."

Grun by the clerk or judicial staff. The court notes that the trial date order has been in the court's file and its computer docket since April 7, 1993. That docket entry is initialed by "SB". Defendant did receive notice of the dismissal. Indeed, the dismissal order itself states that the clerk would mail notices, and the court's docket indicates that the clerk mailed notice to Grun of the dismissal. For purposes of this motion, the court will assume that Grun did not receive notice of the trial date.

Neither party appeared for trial. Grun proclaims that, "[A]pparently no inquiry was made by any Court personnel to determine the reason why the parties failed to appear." (Mot. to Reinstate at 3.) At this juncture, the court notes that it is unaware of, and Grun has not pointed to, any rule or case law which indicates that courts should "track down" parties who do not appear for court.

Grun also declares that, although Defendant Pneumo Abex Corporation's ("Pneumo Abex") counsel received notice of the dismissal, Pneumo Abex's counsel did not contact Grun's attorney. Unlike Grun, Pneumo Abex's counsel did check the court's docket after the dismissal. Interestingly, Grun notes that Pneumo Abex's counsel should have noticed from the docket that Grun did not receive notice of the dismissal (although the docket states that he was given such notice by, again "SB", and the docket has so stated since September 1993), and faults Pneumo Abex's counsel for not phoning Grun to notify him that his own case, against Pneumo Abex's counsel's client, had been dismissed. Essentially, Grun argues that the clerk, the judicial staff, and opposing counsel were derelict in prosecuting his case.

Grun states that he "made efforts to examine the file" and to "otherwise monitor the case." Grun does not state that he or his counsel ever, in three years, examined the court docket. Grun's counsel indicated in open court that "runners" at her firm had gone to the clerk's office to examine the file, and that none of the runners ever mentioned the dismissal. The competence of those runners in analyzing court records is suspect. Grun never, until now, brought his case to the court's attention by a motion, even though he thought it was pending.

Rule 60(a)[2]

Federal Rule of Civil Procedure 60(a) allows the court to correct clerical mistakes in judgments. In determining whether Rule 60(a) applies, the court must distinguish "between changes that implement the result intended by the court at the time the order was entered and changes that alter the original meaning to correct a legal or factual error." Wesco Prods. Co. v. Alloy Auto. Co., 880 F.2d 981, 984 (7th Cir.1989). "If the flaw lies in the translation of the original meaning to the judgment, then Rule 60(a) allows a correction; if the judgment captures the original meaning but is infected by error, then the parties must seek another source of authority to correct the mistake." United States v. Griffin, 782 F.2d 1393, 1396-97 (7th Cir.1986). "Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 2854 (1973).

2/ Grun repeatedly mis-cites cases, and cites unpublished Seventh Circuit cases. The court reminds Grun's counsel of Seventh Circuit Rule 53(b)(2), which bars litigants from citing as authority unpublished orders.

Grun argues that Rule 60(a) applies, as the court's dismissal order was infected by a clerical error, in that Grun never received notice of the trial date or the dismissal. The court disagrees. When the court entered its dismissal order, it intended to dismiss the case because the parties did not appear for trial. The judgment itself captured the court's original meaning; if that judgment was infected by error, such as inadequate notice, Grun must seek another source of authority to correct the mistake.

Rule 60(b)

The other rule by which Grun seeks relief is Federal Rule of Civil Procedure 60(b). Rule 60(b) provides extraordinary relief from judgment, and will be granted only in exceptional circumstances. Dickerson v. Board of Ed. of Ford Heights, Ill., 32 F.3d 1114, 1116 (7th Cir. 1994). District courts have considerable discretion when making Rule 60(b) determinations. Jones v. Phipps, 39 F.3d 158, 162 (7th Cir. 1994). District courts abuse this discretion only where they reach decisions with which no reasonable person could agree. Id.

Rule 60(b) movants seeking to vacate a default judgment must demonstrate three factors: (1) good cause for the default; (2) quick action to correct the default; and (3) a meritorious defense. Id.; Nelson v. City Colleges of Chicago, 962 F.2d 754, 755-56 (7th Cir. 1992). The court will assume that Grun has produced good cause and a meritorious defense for his default: namely, he did not receive notice of the trial date. However, he has not demonstrated quick action to correct the default.

Rule 60(b)(1) provides that the court may relieve a party from judgment based on "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Motions brought pursuant to Rule 60(b)(1) must be filed within one year after the court entered judgment. Fed. R. Civ. P. 60(b). Federal Rule of Civil Procedure 60(b)(6) provides that the court may relieve a party from judgment for any reason which justifies such relief. Motions under Rule 60(b)(6) must be made within a "reasonable time." Fed. R. Civ. P. 60(b). The reasonableness of time depends upon the facts of each case, considering the interests of finality, the reasons for delay, and the prejudice to other parties. Kagan v. Caterpillar Tractor Co., 795 F.2d 601, 610 (7th Cir. 1986). The open-ended "reasonable time" limitation to Rule 60(b)(6) motions may not be used to abrogate the one-year limitation of Rule 60(b)(1). Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co., 69 F.3d 1312, 1315 (7th Cir. 1995).

Parties seeking Rule 60(b)(6) motions must demonstrate diligence. See DeRango v. United States, 864 F.2d 520 (7th Cir. 1988). An attorney's failures, including negligence, do not constitute a basis for Rule 60(b) relief. Russell v. Delco Remy Div. of Gen. Motors, 51 F.3d 746, 749 (7th Cir. 1995). Indeed, it would be an abuse of discretion for a district court to grant Rule 60(b) relief based on counsel's negligence. Lomas & Nettleton Co. v. Wisely, 884 F.2d 965, 967 (7th Cir. 1989). Clients are bound by their attorneys' actions. Nelson, 962 F.2d at 756.

At best, Grun's argument amounts to mistake, inadvertence, surprise, or neglect. Thus, the motion for reconsideration falls within the purview of Rule 60(b)(1). Accordingly, it should have been filed within one year of

judgment. It was not. It took Grun three years to even notice, much less act on, the default, even though the judgment appeared in the court's docket for that amount of time. Because Grun filed the instant motion well over a year after the court dismissed his case, Grun may not use 60(b)(1) as a mode of relief.

Grun attempts to pass the buck for his, or his counsel's negligence in not checking the court docket or moving for a trial date. He complains that neither Pneumo Abex's counsel nor the court notified him of the dismissal. Grun points to no rule or federal case which imposes a duty of defense counsel to inform a plaintiff's counsel of the contents of the public court file.

Moreover, the court does not have a duty to telephone plaintiffs every time it takes action in a case. Such a procedure would be as time consuming as it would be condescending to the attorneys charged with responsibility for keeping track of their cases. Perhaps a clerical error did occur, and Grun did not receive notice. However, Grun had a continuing obligation to check on the status of his case. Grun had a full year to check the court's docket or to file a motion for a trial date. It is up to plaintiffs to move their cases forward in a timely fashion. It is the court's duty to manage those cases in an efficient and just manner. "Once a party invokes the judicial system by filing a lawsuit, it must abide by the rules of the court; a party can not decide for itself when it feels like pressing its action and when it feels like taking a break because '[t]rial judges have a responsibility to litigants to keep their court calendars as current as humanly possible.'" GCIU Employer Retirement Fund v. Chicago Tribune Co., 8 F.3d 1195, 1198 (7th Cir. 1993) (quoting Kagan, 795 F.2d at 608.).

Three years have passed since the court dismissed this case. Pneumo Abex states that it has divested itself of several assets and that the division of Pneumo Abex at issue is no longer under Pneumo Abex's control, having been sold to another company. All of Pneumo Abex's witnesses are out of its control, and its records are scattered. Thus, Pneumo Abex would suffer great difficulty if the court reinstated Grun's case, because Grun took three years to file his motion.

However, in his reply brief, Grun introduces a new argument: that the court's order of dismissal is void and must be vacated as void pursuant to Rule 60(b)(4), because it deprives Grun of due process of law. Rule 60(b)(4) allows courts to vacate "void" judgments. Fed. R. Civ. P. 60(b)(4). A judgment is void where the court which entered it lacked jurisdiction, acted in a manner inconsistent with due process of law, or entered a decree outside of its authority in a manner inconsistent with due process of law.'" United States v. Indoor Cultivation Equip. From High Tech Indoor Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995) (citations omitted). Grun asserts that, because he did not receive "notice" of the trial date or the dismissal, that he was deprived of his "opportunity to be heard" in violation of due process requirements. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). He states, "Due process does not permit a court to convene a secret hearing and, without evidence, rule in favor of one party and against the other, giving notice of the outcome only to the successful party." (Reply at 5.) Thus, contends Grun, the court's order is void ab initio, as it was entered in a manner inconsistent with due process. Indeed, there is no time limit for attacking an order entered absent jurisdiction, Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 400 (7th Cir.

1986), and "the reasonable time criterion of Rule 60(b) as it relates to [Rule 60(b)(4)] void judgments means no time limit." Rodd v. Region Constr. Co., 783 F.2d 89, 91 (7th Cir. 1986).

The court could refuse to consider the argument at this juncture because Grun improperly waited until his reply brief to raise the Rule 60(b)(4) argument grounds and, consequently, the parties did not fully brief the issue. See Doe v. Board of Educ. of Hononegah Community High Sch. Dist. # 207, 833 F. Supp. 1366, 1380 n.4 (N.D. Ill. 1993); United States v. 105,800 Shares of Common Stock of Firstrock Bancorp, Inc., 830 F. Supp. 1101, 1133 n.52 (N.D. Ill. 1993). However, the court has considered the argument and finds that it fails to address a critical line of cases beginning with Link v. Wabash R.R. Co., 82 S. Ct. 1386 (1962) (holding that a district court did not abuse its discretion by dismissing a plaintiff's case with prejudice for want of prosecution, without notice or opportunity to be heard, where the district court was unwilling to accept plaintiff's counsel's excuse for failure to appear at a pretrial conference).

The Link Court began, "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted." Id. at 1388 (citation omitted).

> Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' Anderson

> National Bank v. Luckett, 321 U.S. 233, 246 64 S. Ct. 599, 606, 88 L.Ed. 692. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process.
>
> * * * *
>
> In addition, the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders tha[t] lack of prior notice of less consequence.

Id. at 1389-90. See also Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2135 (1991); Dickerson v. Board of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1116 (7th Cir. 1994); Otis v. City of Chicago, 29 F.3d 1159, 1168(7th Cir. 1994) (noting that courts are not required to give notice of potential dismissals for want of prosecution).

In the instant case, the court finds that its dismissal order, entered after the parties failed to appear for trial, did not offend due process. Therefore, the order is not void for purposes of Rule 60(b)(4). The court's order setting the trial date was in the court's file and computer docket between April 7, 1993, and September 14, 1993—the date of dismissal. Thus, Grun should have known of the impending trial date. Apparently, neither Grun nor his counsel bothered to examine the file during that five-month period. Even if Grun did not receive actual notice of the trial date and the dismissal order was unadvisedly entered, Grun had an effective remedy for correcting any error via a 60(b) motion. Grun was effectively on constructive notice via the trial date order and dismissal order in the court's

file and computer docket. However, he chose not to seek 60(b) relief for three years.

Although Grun may have tried half-heartedly to check on his case, by looking for a trial date on the court's calendar, he essentially "took a break" from pressing his case. One might ask whether he would attempt to verify death by inviting the deceased to dinner. As a result, he did not file a motion for reconsideration for three years. Grun's delay had serious ends: he ended up without a trial. The court will not exercise its discretion to reinstate the case at this juncture. Grun's motion to reinstate is denied.

Alternatively, the court finds that the dismissal order was void ab initio. Thus, the case is technically pending. The last properly-entered order was the order setting this case for trial. That order has been in the court's file and computer since April 3, 1993. Grun has long had constructive notice of the long-passed trial date and the court's clerical error. However, Grun waited three years to bring any error to the court's attention by motion for status or trial, disregarding his responsibility to move his case forward. He demonstrated an intent to abandon his action. Great prejudice to Pneumo Abex resulted. Pneumo Abex no longer has the ability to defend itself: its witnesses, evidence, and resources have dissipated. Consequently, in the alternative, the court dismisses the case for want of prosecution pursuant to Local General Rule 21(A) ("An order of dismissal for want of prosecution or an order of default may be entered if counsel fails to respond to a call of the case set by order of court").

The court is aware that dismissal with prejudice for want of prosecution is a strong sanction which must be reserved only

for extreme circumstances. See Barnhill v. U.S., 11 F.3d 1360, 1367 (7th Cir. 1993). The court finds that Grun's failure to appear for trial and Grun's three-year delay render the instant circumstances extreme.

CONCLUSION

The court denies Grun's motion to reinstate. In the alternative, the court vacates the original dismissal order but dismisses the case for want of prosecution.

IT IS SO ORDERED.

ENTER:

/s/ Charles R. Norgle, Sr.
CHARLES RONALD NORGLE, SR.,
Judge
United States District Court

DATED: 12-17-96

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM F. GRUN,	)
	)
Plaintiff,	)
	) No. 90 C 5273
v.	)
	) HONORABLE
PNEUMO ABEX	) CHARLES R. NORGLE
CORPORATION,	)
PA HOLDINGS	)
CORPORATION and	)
THE HENLEY GROUP, INC.,	)
	)
Defendants.	)

ORDER

Before the court are plaintiff William F. Grun's ("Grun") motion for summary judgment with respect to Count I of his complaint and defendants' motion for summary judgment with respect to Counts I, II, and III of the complaint. Pursuant to 28 U.S.C. § 636(b)(1), the court referred the motions for summary judgment to Magistrate Judge Joan H. Lefkow. The Magistrate Judge, after review of the record, issued on October 1, 1992 a 19-page Report and Recommendation (the "Report," attached as Exhibit A). For the following reasons, the Report is adopted in part.

FACTS

In January, 1986, Grun became president and general manager of NWL Control Systems ("NWL"), a division of defendant Pneumo Abex Corporation ("Pneumo Abex") headquartered in Kalamazoo, Michigan. In 1987, Grun entered into a severance compensation agreement (the "SCA") with Pneumo Abex. The SCA provided that Grun would be entitled to severance compensation, calculated in accordance with the terms therein, if he terminated his employment for any one of several "good reasons" set forth in the SCA within two years after a change in control of Pneumo Abex. In April, 1988, Pneumo Abex was purchased by PA Holdings Corporation, which constituted a change in control under the SCA. In 1989, Grun resigned from NWL and requested that he be paid in accordance with the terms of the SCA; Grun supported his entitlement to the severance compensation by identifying five "good reasons" under the SCA for his resignation. After reviewing the "good reasons" submitted by Grun, Pneumo Abex determined that Grun did not have reason to terminate his employment, and accordingly, denied compensation under the SCA. Subsequently, Grun initiated the instant suit, seeking to recover benefits from Pneumo Abex, under the SCA and under an executive bonus plan, and punitive damages from PA Holdings Corporation (PA Holdings) and The Henley Group, Inc. (Henley) for contractual interference.

In support of his motion for summary judgment, Grun asserts that the events necessary to trigger his right to receive severance compensation under the SCA have occurred. Pneumo Abex responds that Grun has interpreted the SCA incorrectly and that none of the preconditions set forth in the SCA have been satisfied. The defendants further argue that

Count II of Grun's complaint is preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"), and furthermore, that the undisputed facts establish that Grun cannot prevail on the merits of either Count II or III.

Magistrate Judge Lefkow recommended that this court grant Grun's motion for summary judgment with respect to Count I, grant defendants' motion for summary judgment with respect to Count II, and deny defendants' motion with respect to Counts I and III. Both Grun and the defendants have filed objections to the Report, each objecting to the recommended finding of summary judgment against them. The court has completely reviewed the Report and the arguments of counsel on a de novo standard. 28 U.S.C. § 636(b)(1).

DISCUSSION

With respect to Count I, the Magistrate Judge concluded that Grun was entitled to recover severance compensation under ¶ 3(e)(vi) of the SCA. Paragraph 3(e)(vi) provided that Grun would be entitled to severance compensation if, following a change in control of Pneumo Abex, the following occurred: "a relocation of [Pneumo Abex's] principal executive offices or [Grun's] relocation to any place other than the location at which [Grun] performed [his] duties prior to a Change in Control of [Pneumo Abex]." (emphasis added). As the Magistrate Judge found, there is no dispute that Pneumo Abex's executive offices in Boston, Massachusetts were closed in the fall of 1989. Magistrate Judge Lefkow thus concluded that all events necessary to establish Grun's rights under the SCA had occurred and recommended that Grun's motion for summary judgment on Count I of the complaint be granted. The court, however, disagrees with the Magistrate Judge's

analysis and, accordingly, denies all parties' summary judgment motions with respect to Count I.

Despite Pneumo Abex's concession that ¶ 3(e)(vi) "is awkwardly drafted and seems to make little sense," the terms and meaning of that paragraph are actually straightforward and unequivocal. The plain meaning of this provision is that Grun would be entitled to the SCA benefits if Pneumo Abex's principal executive offices in Boston were relocated; the fact that Grun, who worked in Kalamazoo, Michigan, and lived in Portage, Michigan, would be entitled to a substantial severance benefit because of such a relocation is not contradicted by the terms. Evidently aware of the plain meaning of ¶ 3(e)(vi), Pneumo Abex advised Grun on March 25, 1988, that it "did not intend for [Grun] to become entitled to termination compensation under Section 3(e)(vi) . . . by virtue of the relocation of the Company's principal executive offices unless there is also a relocation of your present office." Thus, whether Grun is entitled to SCA benefits solely because of Pneumo Abex's move from Boston depends on what, if any, effect the March 25, 1988 letter had on the terms of ¶ 3(e)vi).

As the Magistrate Judge concluded, the SCA is an employee benefit plan, the application and interpretation of which is governed by ERISA. Under ERISA, employee benefits are either "welfare" benefits or "retirement or pension" benefits. 29 U.S.C. § 1002(1) , (2). Under ERISA, retirement benefit plans are subjected to stringent accrual, vesting, and funding requirements; such requirements, however, are not imposed on welfare benefit plans. 29 U.S.C. §§ 1051, 1081. Severance benefit plans, such as the SCA, are welfare benefit plans. Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir.), *cert. denied*, 488 U.S. 981 (1988); Holland v.

Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985) *aff'd*, 477 U.S. 901, *cert. denied*, 477 U.S. 903 (1986). Consequently, severance benefits are unaccrued, unvested benefits, and even though subject to certain disclosure (29 U.S.C. §§ 1021-1031) and fiduciary (29 U.S.C. §§ 1101-1114) requirements, are exempt from the more stringent ERISA requirements. Young, 849 F.2d at 1045. Because an employer is permitted to act as both the manager of its business and a fiduciary with respect to unaccrued benefits, an employer is therefore free to alter or eliminate severance benefits without consideration of the employees' interests. Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). Accordingly, an employer may unilaterally amend or eliminate a severance plan without violating ERISA. Id.; *see also* Kreutzer v. A.O. Smith Corp., 951 F.2d 739, 743 (7th Cir. 1991) (an employer may change or abolish welfare benefits without violating ERISA); Seiman v. Warner-Lambert Co., 889 F.2d 1346, 1348 (4th Cir. 1989) (because severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan).

Although the terms of ERISA would permit Pneumo Abex to unilaterally modify the SCA, Pneumo Abex agreed to forego that right. ERISA requires every employee benefit plan to be created by and maintained pursuant to a written instrument. 29 U.S.C. § 1102(a)(1). Through these instruments, parties are free to subject such benefits to requirements that are not mandated by ERISA, or they may reserve the power to terminate or modify such plans. Ryan v. Chromalloy American Corp., 877 F.2d 598, 603 (7th Cir. 1989). The employee benefits which Grun seeks to recover were created and

governed by the SCA, with the following provision: "Miscellaneous. No provision of this Agreement may be modified, waived or discharged unless such waiver, modification or discharge is agreed to in writing signed by [Grun] and [Pneumo Abex]." The March 25, 1988 letter of Pneumo Abex was not signed or agreed to by Grun; therefore, by the terms of the SCA Pneumo Abex's epistolary clarification was not sufficient to modify the express terms of the SCA.

The plain language of ¶ 3(e)(vi) is clear and unambiguous, and as such, the interpretation of this paragraph is a matter of law. The overriding goal of contract interpretation is to give effect to the mutual intent of the parties at the time the contract was made. Lowrance v. Hacker, 888 F.2d 49, 51 (7th Cir. 1989). Thus, even though the literal meaning expressed by the language of a contract is usually the best evidence of that intent, even unambiguous language can be disregarded when the parties meant something other than that which was committed to paper. White v. Roughton, 689 F.2d 118, 120 (7th Cir. 1982). The record before the court does not provide an explanation as to why Pneumo Abex would agree to compensate Grun with over $800,000 in severance benefits for an office relocation which had minimal, if any, affect on Grun's work-related activities. That Grun is entitled to SCA benefits because of Pneumo Abex's relocation from Boston is a nonsequitur, indicative of a mutual mistake in the contract terms, which raises material issues of genuine facts concerning the SCA's execution.

The intended purpose of the SCA was to induce Grun to remain employed by Pneumo Abex, in the event of a change in control, by providing Grun with certain job assurances. That

Grun, a Michigan resident, receive the SCA benefits upon relocation of Pneumo Abex's Boston office is not a logical job assurance which would effectuate the purpose of the SCA. In general, parties' intentions are to be measured by their outward manifestations, as opposed to some secret, cryptic, or turbid expression of intent. The court, however, when necessary to carry into effect the intention of the parties, must also consider the relevant circumstances surrounding the negotiation and execution of the document. Connecticut Gen. Life Ins. Co. v. Chicago Title and Trust Co., 714 F.2d 48 (7th Cir. 1983). Whether Pneumo Abex and Grun intended to enter into an agreement whereby Grun would receive a substantial monetary benefit upon the occurrence of an event which would have no bearing on the job performed by Grun raises genuine issues of material fact. To decipher the actual expectations of the parties, the court must look to the negotiation, bargaining, and past conduct of the parties, and to the context in which the SCA was drafted. Thus, material issues of fact, which preclude summary judgment, exist as to Count I of Grun's complaint, and the Magistrate Judge's recommendation that summary judgment be granted in Grun's favor is rejected.

The second cause of action presented in Grun's complaint is entitled "Intentional Interference With Contractual Relations Against PA Holdings and Henley." Because the SCA constitutes an employee benefit plan within the meaning of ERISA, the Magistrate Judge concluded that this cause of action was preempted by ERISA and recommended granting summary judgment in favor of the defendants. The Court adopts the Magistrate Judge's recommendation, but modifies the reasoning as follows.

The preemptive provision of ERISA is to be broadly construed and extends to common law tort and contract actions. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987). Evan claims based on state-law doctrines that are not specifically designed to affect benefit plans, but that include such plans within their sweep, are preempted when the claims relate to the administration of a benefit plan. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). Grun's claims arise from his efforts to attain benefits under the SCA. His complaint alleges that PA Holdings and Henley designed and schemed to deprive him of the benefits of the SCA. This allegation amounts to interference with the administrative duties created by the SCA and is thus an activity regulated by ERISA.

Although any state-law claims Grun may have against PA Holdings or Henley for interference with the SCA administration are preempted by ERISA, the Seventh Circuit has recognized a cause of action under ERISA against non-fiduciaries who participated or conspired with an ERISA fiduciary to breach fiduciary duties owed the beneficiary. Thornton v. Evans, 692 F.2d 1064, 1078 (7th Cir. 1982); *see also* Whitfield v. Lindemann, 853 F.2d 1298, 1303 (5th Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989); Brock v. Hendershott, 840 F.2d 339, 342 (6th Cir. 1988); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-21 (2nd Cir. 1987); Fink v. National Sav. & Trust Co., 772 F.2d 951, 958 (D.C. Cir. 1985) (dicta); *but see* Nieto v. Ecker, 845 F.2d 868, 871 (9th Cir. 1988) (no cause of action against non-fiduciaries exists under ERISA).

Grun has limned a grievance and has demanded relief; to the extent ERISA permits a cause of action against non-fiduciary third parties, Grun's Count II is not preempted. The

relief sought by Grun's second cause of action, however, is punitive damages. The Supreme Court has held that §§ 409 and 502(a)(2) of ERISA do not provide for the recovery of punitive damages in suits brought by an individual beneficiary against a fiduciary. Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985); *see also* Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 1084 (1981) (award of punitive damages inappropriate where fiduciary duty breached). Furthermore, principles of trust law are appropriately factored into ERISA to develop a federal common law of employee benefit plans where to do so is not inconsistent with the legislative scheme (*See* Russell 473 U.S. at 148), and under the law of trusts, punitive damages are generally not recoverable from trustees for breach of fiduciary duty. Kleinhans v. Lisle Sav. Profit Sharing Trust, 810 F.2d 618, 626-7 (7th Cir. 1987). Congress recognized that the courts, in interpreting ERISA, would need to develop a body of federal common law to address the issues raised under the statute, and as a matter of federal common law, an award of punitive damages is inappropriate to a claim of interference with employee benefit plans. Accordingly, with regard to Grun's second count, the defendants' motion for summary judgment is granted.

With regard to Grun's third and final claim, the Magistrate Judge found that the defendants had not shown, based on undisputed facts, that there was an absence of evidence to support Grun's case. Accordingly, the Magistrate Judge did not recommend the entry of summary judgment in favor of the defendants. The court has completely reviewed the Magistrate Judge's recommendation with respect to Count III and finds it to be thorough, accurate, and the decision proper. Accordingly,

the Court adopts and incorporates, pursuant to 28 U.S.C. § 636(b)(1), this portion of Magistrate Judge Lefkow's Report and Recommendation, denying defendants' motion for summary judgment as to Count III.

CONCLUSION

The court adopts in part and incorporates Magistrate Judge Lefkow's Report and Recommendation, as modified herein, and thereby denies Grun's motion for summary judgment with respect to Count I of his complaint, grants defendants' motion for summary judgment with respect to Count II of Grun's complaint, and denies defendants' motion for summary judgment with respect to Counts I and III of Grun's complaint.

IT IS SO ORDERED.

ENTER:

/s/ Charles R. Norgle
CHARLES RONALD NORGLE, SR.,
Judge
United States District Court

DATED: 11/18/92

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 5, 1999

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. TERENCE EVANS, *Circuit Judge*

WILLIAM F. GRUN, *Plaintiff-Appellant*,	)	Appeal from the United States District Court for the Northern
No. 97-1410 v.	)	District of Illinois, Eastern Division
PNEUMO ABEX CORPORATION, PA HOLDINGS CORPORATION, and THE HENLEY GROUP, INC. *Defendant-Appellees*.	)	No. 90 C 5273 Charles R. Norgle, Sr., *Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.